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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

STEVEN L. MERRITT and CAROL MERRITT,

Petitioners,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is the United States absolutely immune under the Flood Control Act, 33 U.S.C. 702c, even where the only nexus between the government's negligence and its flood control activities is that the injuries occurred on waters used for flood control?

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Steven L. Merritt and Carol Merritt, individually and as husband and wife, respectfully pray that a writ of certiorari issue to review the August 12, 1997, judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of August 12, 1997, *Merritt v. United States*, No. 96-16232 (9th Cir. Aug. 12, 1997), was an unpublished disposition, reported tabularly at 121 F.3d 716 (9th Cir. 1997), electronically at 1997 WL 458600, and is reprinted at Pet. App. 2a. A Petition for Rehearing with a Suggestion for Rehearing En Banc was denied by the Ninth Circuit on November 14, 1997. See Pet. App. 1a.

The memorandum and order of the U.S. District Court for the District of Arizona, Judge McNamee, presiding, of May 28, 1996, was unreported. See Pet. App. 8a. An earlier jurisdictional ruling of the district court of June 1, 1995, was unpublished, but reported electronically at 1996 WL 650120, and is reprinted at Pet. App. 15a.

STATEMENT OF JURISDICTION

Petitioners seek review from the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of August

12, 1997. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on November 14, 1997. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Flood Control Act of 1928, 33 U.S.C. § 702c, provides in relevant part that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

STATEMENT

1. On the evening of August 25, 1992, Steven L. Merritt suffered serious injuries when the boat he was piloting collided with a 8' x 4' wood and metal sign standing in the waters of Lake Havasu, Arizona. The sign ostensibly marked the boundary of the Havasu National Wildlife Refuge and was erected by the U.S. Fish and Wildlife Service. The sign was dark-stained and was invisible at night because it had neither lights nor reflective markings. No warning devices had been placed around or near the sign. Pet. App. 3a, 8a.

The incident occurred about 600 feet offshore, just as Mr. Merritt was returning his watercraft to the Windsor Beach boat ramp. Lake Havasu is located above Parker Dam on the Colorado River. Parker Dam was authorized by the Act of August 30, 1935, 49 Stat. 1028, 1039-40 (1935).

2. a. Steven Merritt and his wife, Carol, filed suit in federal district court, claiming that the erection and

maintenance of the sign was a hazard to navigation and was negligent. The original jurisdictional basis of the suit was under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680. The United States moved to dismiss the Complaint for lack of jurisdiction, arguing that the proper basis of the action was under the Suits in Admiralty Act (SIAA), 46 U.S.C. §§ 741 *et seq*, since the tort occurred on a navigable water of the United States within the admiralty jurisdiction of the court. In an order dated June 1, 1995, the district court agreed, but also gave the Merritts leave to amend their Complaint to state a cause of action under the SIAA. Pet. App. 16a-18a.

Thereafter, the United States sought to dismiss the Merritts' action under the authority of the Flood Control Act of 1928, 33 U.S.C. § 702c ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."). The district court granted the motion, based on the construction accorded to § 702c by the Ninth Circuit. Pet. App. 11a-12a. The district court ruled that because the waters of Lake Havasu are part of a federal flood control project associated with Parker Dam, they qualify as "flood waters" for purposes of § 702c. Pet. App. 10a-11a.

The district court then went on to determine whether there was "a sufficient nexus between the injury sustained by Merritt and the operation of" the flood control project. Pet. App. 11a. Because the Merritts' injuries were (under the Ninth Circuit's test) "not wholly unrelated" to flood waters, immunity attached under § 702c, and the court lacked jurisdiction under the SIAA.

b. The Ninth Circuit affirmed, but acknowledged that it could do so only under its "broad" interpretation of section 702c, requiring a plaintiff to prove that its damages were

"wholly unrelated" to "floods" or "flood waters." Pet. App. 5a. ("Yet, the broad language in McCarthy [v. United States, 850 F.2d 558, 560 (9th Cir. 1980)] and other Ninth Circuit cases make it clear that only a minimal causal nexus is required for immunity to attach."). The Ninth Circuit conceded that its "wholly unrelated" test was at variance with other courts of appeals. Pet. App. 6a (discussing, and declining to follow, *Cantrell v. United States*, 89 F.3d 268, 271 (6th Cir. 1996)). "We cannot," the Ninth Circuit noted below, "adopt a new standard . . . where our own precedent on this issue is so clear." Id.

The Ninth Circuit believed that the "minimal causal nexus" was satisfied here by the mere "presence of flood water in a federal flood control project 'creat[ing] a condition' -- including Lake Havasu as part of a federal flood control project -- under which Mr. Merritt engaged in recreational boating and suffered injury." Pet. App. 5a (quoting *McCarthy*, 850 F.2d at 561). The fact that the accident was caused by the negligent placement of a sign erected by the Fish and Wildlife Service to mark the boundary of a reserve did not sway the court: "Although the lake's use for wildlife preservation, and not for flood control, was the alleged cause of Mr. Merritt's injuries in this case, the lake continues to be used for flood control purposes. There is, therefore, a sufficient nexus between the flood control project and his injuries such that government immunity attaches." Pet. App. 4a.

In concluding its opinion, the Ninth Circuit noted that "[d]espite the compelling reasons for our decision, we are not altogether comfortable about the outcome in the case. Under the facts alleged, the government's negligence caused the plaintiff, who was authorized to operate a boat on Lake Havasu, to suffer physical harm to both person and

property." Pet. App. 6a. Notwithstanding that "this result may seem unjust," the Ninth Circuit clung to its "extremely broad" reading of the Flood Control Act. Id.

REASONS FOR GRANTING THE PETITION

This Petition asks the Court to provide a credible construction of the immunity provision of the 1928 Flood Control Act. Since this Court's decision in *United States v. James*, 478 U.S. 597 (1986), extending section 702c immunity to personal injury claims, a growing schism has developed between the courts of appeals. The Ninth Circuit adheres to what it admits is an "extremely broad" test which gives expansive governmental immunity. That court has now held that the United States is immune from suit even where there is no real causal nexus between the alleged government negligence and its flood control activities, aside from the serendipity that the incident happened to occur on a flood control water.

1. There is a sharp split in the circuits as to how properly to interpret section 702c. The Ninth Circuit, in the decision for which review is sought here, frankly acknowledged the division. Pet. App. 6a (discussing, and declining to follow, *Cantrell v. United States*, 89 F.3d 268, 271 (6th Cir. 1996)). This observation has been repeated in other, recent Ninth Circuit decisions. See *Washington v. East Columbia Basin Irrigation District*, 105 F.3d 517, 519 & n.3 (9th Cir.), cert. denied, 118 S.Ct. 364 (1997) ("[T]he Supreme Court's failure to resolve the circuit split has been the subject of much discussion and speculation in recent cases.").

Other courts have likewise indicated that the discordant jurisprudence for the flood immunity provision of § 702c has become untenable. See *Cantrell*, 89 F.3d at 271; *Boudreau v. United States*, 53 F.3d 81, 83 (5th Cir. 1995) ("there is disagreement among the circuits on the application of § 702c."), cert. denied, 116 S.Ct. 771 (1996); *Dawson v. United States*, 894 F.2d 70, 73 (3d Cir. 1990).

The fault-line marking the split between the circuits is, as the Solicitor General has previously acknowledged in filings in this Court, see *Boudreau v. United States*, Brief for the United States in Opposition, at 7 (U.S. No. 95-398) (December 1995), the Ninth Circuit's test of "bar[ring] all claims arising from injuries at flood control projects unless the injuries are *wholly unrelated* to flood control." Id. (original emphasis). This "approach" (as the Solicitor General characterized it) is shared by the Third and Fifth Circuits. See *Dawson*, 894 F.2d at 73; *Boudreau*, 53 F.3d at 84.

On the other side of the divide are those courts that have rejected the Ninth Circuit's "wholly unrelated" test and have required a showing of some sort of nexus between the plaintiff's injuries and the government's flood control activities, before section 702c immunity is invoked. The Fourth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have adopted this approach, and, in so doing, have been sharply critical of the Ninth Circuit precedents. See, e.g., *Cantrell*, 89 F.3d at 271 ("such a sweeping grant of immunity makes little sense in light of the text and purpose of the [Flood Control] Act."); *Reese v. South Florida Water Mgt. Dist.*, 59 F.3d 1128 (1995); *Holt v. United States*, 46 F.3d 1000, 1005 (10th Cir. 1995); *Fisher v. United States Army Corps of Engineers*, 31 F.3d 683, 685 (8th Cir. 1994); *Fryman v. United States*, 901 F.2d 79, 81 (7th Cir.), cert.

denied, 498 U.S. 920 (1990); *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978). And if this basic schism in approach is not enough to frustrate a uniform application of § 702c immunity, there is also, as one court described it, "a bewildering array of linguistic tests" which overlay a determination whether an incident involves "flood waters" for the purposes of the 1928 Act. *Cantrell*, 89 F.3d at 272.[1]

In the holding below, the Ninth Circuit properly recognized that its decisions were, at a bare minimum, fundamentally at odds with the approach taken by the Sixth Circuit in *Cantrell*. See Pet. App. 6a. Indeed, the Solicitor General has previously noted to this Court that the analysis used in *Cantrell* -- explicitly "requiring . . . a connection between federal flood control efforts and the alleged tortious conduct to support immunity under Section 702c" -- is irreconcilable with the Ninth Circuit's case law. *East Columbia Basin Irrigation District v. United States*, Brief for the United States in Opposition, at 9-10 n.4 (96-2054) (September 1997).

2. Petitioners submit that this basic division among the circuits -- the categorical "wholly unrelated" test versus a reasonable nexus standard -- is unlikely to narrow. As the citations made above indicate, the tempo of litigation involving the 1928 Act has accelerated. Petitioners are mindful that this Court has had the opportunity to revisit the

[1] The Sixth Circuit has emphasized whether "an act constituting part or all of the alleged breach of the duty of care was an act undertaken to control flooding." *Cantrell*, 89 F.3d at 269. The Seventh Circuit considers whether a flood control activity "increase[d] the probability of injury." *Fryman*, 901 F.2d at 82; see also *Bailey v. United States*, 35 F.3d 1118 (7th Cir. 1994). The Eighth Circuit has decided on the basis of whether "government control of flood waters was a substantial factor" in causing the injuries. *Fisher*, 31 F.3d at 684. The Eleventh Circuit has framed the inquiry as whether the injury "arose directly out of . . . floodwater control operations." *Reese*, 59 F.3d at 1131. Finally, the Fourth Circuit has focussed on the role of non-flood control activities. See *Hayes*, 585 F.2d at 702.

interpretation of section 702c after its decision in *James*, but has declined to do so. See, e.g., *Hiersche v. United States*, 503 U.S. 923 (1992) (Stevens, J., memo respecting the denial of certiorari). There are, however, compelling reasons for the Court to grant this Petition.

First, there is no doubt that the Ninth Circuit's application of its "extremely broad" and expansive grant of immunity under § 702c was dispositive here. The court of appeals as much as said that applying a test other than a "minimal causal nexus" would have yielded a different result. See Pet. App. 6a. The Ninth Circuit was compelled to acknowledge that an injury caused by the negligence of the government in erecting a sign marking the boundary of a wildlife refuge has only a tangential relation to flood control and § 702c immunity. Indeed, it seems that the application of the Ninth Circuit's "wholly unrelated" test means that any occurrence on a federal flood control water will be barred by § 702c. Pet. App. 4a ("Although the lake's use for wildlife preservation, and not for flood control, was the alleged cause of Mr. Merritt's injuries in this case, the lake continues to be used for flood control purposes. There is, therefore, a sufficient nexus between the flood control project and his injuries such that government immunity attaches.").

Second, nothing in the Ninth Circuit's "wholly unrelated" or "minimal causal nexus" test is sanctioned by this Court's holding in *James*. *James* was, of course, limited to the question of whether § 702c applies to both personal injury and property damage claims. This Court sensibly ruled that it does, see 478 U.S. at 605, and Petitioners need not (and will not) seek to revisit that question. And while this Court did note that the use of the words "*any* damage" and "liability of *any* kind" in section 702c "undercuts a narrow construction," id. at 604-05, it made clear that the

grant of immunity was "from any liability associated with flood control." Id. at 608. Inherent in *James* is the demand that courts find a causal connection between the plaintiff's injury and governmental flood control efforts. Were it otherwise, it would be (as the Seventh Circuit, per Easterbrook, J., has noted) that "*James* was so broadly written that it cannot be applied literally." *Fryman*, 901 F.2d at 81; *Boudreau*, 53 F.3d at 87 (Smith, J., dissenting) ("This passage from *James*, must be construed in light of . . . the plain language of 702(c).").

Finally, while Petitioners are mindful that section 702c cases are truly "fact-intensive" inquiries, the Ninth Circuit's decision requires review because it perpetuates and extends a legal test that is insensible to factual complexity and causal connection.[2] Petitioners will be prepared to argue to this Court that § 702c immunity is properly granted where there is a substantial causal connection -- not a "minimal causal nexus" as the Ninth Circuit held -- between the alleged government negligence and a flood control activity. In persisting in its "wholly unrelated" test, the Ninth Circuit is simply ruling that the United States is immune for *any* negligence occurring on flood control waters. This is contrary to the text and purpose of the 1928 Act, its construction in *James*, and the weight of authority from other courts of appeals.

[2] In a slightly different context, this Court has recently ruled that in the application of the general maritime law, proximate cause and superseding cause remain relevant considerations. See *Exxon Co., U.S.A. v. Sofec, Inc.*, 116 S.Ct. 1813, 1817-18 (1996). Like the Ninth Circuit below, Pet. App. 5a (calling the law of contributing, superseding or intervening causes a "morass"), the Petitioner in *Exxon* sought to "eschew" "the 'confusing maze of common-law proximate cause concepts'." 116 S.Ct. at 1818 (quoting Petitioner's Reply Brief). The Court in *Exxon* rejected this argument, and, if it so disposed, should rule here that proximate cause remains a relevant consideration in determining whether § 702c immunity attaches to non-flood control activities.

CONCLUSION

For the foregoing reasons, this Petition ought to be GRANTED.

Respectfully submitted,

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December 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Steven L. MERRITT; Carol Merritt, Individually and as husband and wife,
Plaintiffs-Appellants,
v.
UNITED STATES of America, Defendant-Appellee.

No. 96-16232.

Filed Nov. 14, 1997.

Before: HALL and WIGGINS, Circuit Judges and SHADUR, District Judge. [FN**]

FN** Hon. Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

The panel has voted to deny the petition for rehearing and recommends the rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a regearing en banc is rejected.

NOTICE: Ninth Circuit Rule 36-3 provides that dispositions other than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

Steven L. MERRITT; Carol Merritt, Individually and as husband and wife,
Plaintiffs-Appellants,
v.
UNITED STATES of America, Defendant-Appellee.

No. 96-16232.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 14, 1997.

Decided Aug. 12, 1997.

Appeal from the United States District Court for the District of Arizona, D.C. No. CV-94-01262-SMM; Stephen M. McNamee, District Judge, Presiding.

Before: HALL and WIGGINS, Circuit Judges and SHADUR, District Judge. [FN**]

FN** Hon. Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Steven L. Merritt and Carol Merritt appeal the district court's dismissal of their lawsuit against the United States for injuries sustained in a boating accident on Lake Havasu, Arizona. Mr. Merritt's boat collided with a wooden sign 800 feet from the southern boundary of the Lake Havasu National Wildlife Refuge. The sign was not visible at night because it had neither lights nor reflective markings.

Merritt and his wife filed an amended complaint against the United States pursuant to the Suits in Admiralty Act, 46 U.S.C. app. §§ 741-52 (1920). The United States asserted lack of subject matter jurisdiction based on the immunity provision of the Federal Flood Control Act of 1928, 33 U.S.C. § 702c. The district court granted the United States government's motion to dismiss under Fed.R.Civ.P. 12(b)(1). A district court order dismissing for lack of subject matter jurisdiction presents a question of law, reviewable de novo. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir.1988). We affirm.

The Flood Control Act of 1928 provides: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place ... " 33 U.S.C. § 702c. In United States v. James, the Supreme Court explained Congress's intent to confer governmental immunity "in sweeping terms" under these circumstances, stating, "[i]t is difficult to imagine broader language." 478 U.S. 597, 604 (1986). In keeping with this idea, the Ninth Circuit set forth the following test for

granting governmental immunity:

> So long as the project is authorized by Congress for flood control purposes, and the damage or injury is related to use of that project, immunity continues to attach.

McCarthy, 850 F.2d at 562.

The issue on appeal is whether there is a sufficient nexus between Steven Merritt's injury and a flood control project authorized by Congress such that immunity attaches. In McCarthy, we explained that the nexus requirement test was satisfied "so long as the damage or the injury was not 'wholly unrelated' to a Congressionally authorized flood control project." 850 F.2d at 563. See also Washington v. East Columbia Basin Irrigation Dist., 105 F.3d 517, 520 (9th Cir.1997); Morici Corp. v. United States, 681 F.2d 645, 648 (9th Cir.1982). Plaintiffs argue that the erection and maintenance of the sign furthered the purposes of the Havasu National Wildlife Refuge, not the purposes of flood control. In addition, plaintiffs maintain that a sufficient nexus for purposes of § 702c immunity does not exist because the hazard presented by the sign was neither a result of, nor affected by, the Parker Dam facility's flood control management activities.

We have held, however, that the distinction between active and passive operations of a flood control project cannot be maintained, stating "[i]t is clear the immunity provision of § 702c can apply even though a federal project has multiple purposes and is not intended exclusively for flood control." McCarthy, 850 F.2d at 562. Although the lake's use for wildlife preservation, and not for flood control, was the alleged cause of Mr. Merritt's injuries in this case, the lake continues to be used for flood control purposes. There is, therefore, a sufficient nexus between the flood control project

and his injuries such that government immunity attaches.

Plaintiffs nevertheless contend McCarthy 's analysis is not controlling because the damage in McCarthy was more directly related to flood control management than the facts of this case. Thus, plaintiffs claim that even under McCarthy the nexus between Merritt's injury and a federally authorized flood control project is so remote that no immunity should attach.

Yet, the broad language in McCarthy and other Ninth Circuit cases makes it clear that only a minimal causal nexus is required for immunity to attach. The differing nature of the facts in McCarthy and those alleged in this case does not render inapplicable McCarthy 's broad holding. As the Supreme Court in James found:

> [T]he sweeping language of § 702c was no drafting inadvertence. Congress clearly sought to ensure beyond doubt sovereign immunity would protect the government from "any" liability associated with flood control.

James, 478 U.S. at 608 (internal citation omitted). Further, we have expressly declined to "venture into the morass of contributing causes, superseding causes, and intervening causes." Washington, 105 F.3d at 520 (internal quotations omitted).

In this case, the presence of [illegible] water in a federal flood control project "created a condition"--including Lake Havasu as part of a federal flood control project--under which Mr. Merritt engaged in recreational boating and suffered injury. Cf. McCarthy, at 561 ("By including Lewisville Lake as part of a larger federal flood control facility, the United States created a 'condition' which under a variety of circumstances could result in harm to person and property.") Moreover, the deposition of Gregory Wolf suggests that the

water levels at Lake Havasu may have played a role in Mr. Merritt's injuries, as water levels did in McCarthy. In any event, Mr. Merritt's injury was indeed a result of the use of the federal flood project at Lake Havasu, and thus, the causal nexus required in the Ninth Circuit is satisfied.

Finally, we decline plaintiffs' invitation to adopt the analysis of Cantrell v. United States, 89 F.3d 268 (6th Cir.1996). In Cantrell, the Sixth Circuit stated that "it is a court's obligation when faced with questions of causation to weigh the significance of a proposed cause." Id. at 272. More specifically, "Instead of focusing on the injury (or its location), we focus on the particular tortious act for which the plaintiff is trying to hold the government liable." Id. at 273. Under this test, the plaintiff argues that his injuries were not "from or by floods or floodwaters" or activities related to flood project management. We cannot adopt a new standard, however, when our own precedent on this issue is so clear. Even the court in Cantrell acknowledged that its analysis differed from our precedent. Id. at 271.

Despite the compelling reasons for our decision, we are not altogether comfortable about the outcome in this case. Under the facts alleged, the government's negligence caused the plaintiff, who was authorized to operate a boat on Lake Havasu, to suffer physical harm to both person and property. While we are mindful that this result may seem unjust, Congress, for better or for worse, has chosen to confer immunity in an extremely broad fashion. As Justice Stevens observed:

> The statute at issue here is an anachronism. It was enacted 18 years before the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., waived the Federal Government's sovereign immunity from liability for personal injuries. At the time

> of its enactment, no consideration was given to the power generation, recreational, and conservation purposes of flood-control projects, or to their possible impact on the then nonexistent federal liability for personal injury and death caused by the negligent operation of such projects. Today this obsolete legislative remnant is nothing more than an engine of injustice. Congress, not this Court, has the primary duty to confront the question whether any part of this harsh immunity doctrine should be retained.

Hiersche v. United States, 503 U.S. 923, 926 (1992) (Stevens, J., respecting the denial of a petition for writ of certiorari.)

In sum, the district court did not err when it concluded that the immunity provision of 33 U.S.C. § 702c grants the government immunity from suit for injuries sustained by Merritt while on Lake Havasu. Because the accident occurred on Lake Havasu, which is floodwater for the purpose of the statute, and the accident was not "wholly unrelated" to the operation of a federal flood control project, immunity attaches to bar the plaintiffs' claim.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

STEVEN L. MERRITT and CAROL MERRITT, individually and as husband and wife,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CIV-94-1262-PCT-SMM

MEMORANDUM OF DECISION AND ORDER

I. BACKGROUND

Plaintiffs, Steven and Carol Merritt, brought this action pursuant to 46 U.S.C. § 741 *et seq*. Plaintiffs seek damages from the United States for injuries sustained when the jet boat Steven Merritt ("Merritt") owned and was piloting collided with a wooden sign in the waters of Lake Havasu. The sign, which marked the border of the Havasu Wildlife Refuge within Lake Havasu, was owned by the United States through its Fish and Wildlife Service, an entity within the Department of Interior.

Pending before the court is Defendant's Motion to dismiss based on lack of subject matter jurisdiction.

II. STANDARD OF REVIEW

A court should not dismiss a complaint unless convinced beyond a doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Parks Sch. of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). The complaint is construed in the light most favorable to the plaintiff. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.), cert. denied, 454 U.S. 1031 (1981).

When considering a motion to dismiss pursuant to Rule 12(b)(1), the district court is not restricted to the face of the pleading, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. Land v. Dollar, 330 U.S. 731, 735 n.4, 67 S.Ct. 1009, 1011 n.4 (1947); McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489 U.S. 1052, 109 S.Ct. 1312 (1989). The burden of proof is on the party asserting jurisdiction. See Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)(quoted in Thornhill Publishing Co. v. General Tel. & Electronics Corp., 594 F.2d 730, 73 (9th Cir. 1979)).

III. DISCUSSION

Plaintiffs' claim alleges injury on the waters of a congressionally authorized flood control project. Defendant argues that this Court lacks subject matter jurisdiction over this matter because the United States has not waived sovereign immunity with respect to tort claims involving floods or flood waters. Plaintiffs contend that the acts of

negligence alleged in this case were not a part of the management of a flood control project, but were instead part of the management of the Havasu Wildlife Refuge for the purpose of furthering refuge wildlife conservation and preservation activities. Plaintiffs further argue that the United States is not immune from tort liability when Plaintiffs' injuries were caused by governmental activity unrelated to any expenditure of federal funds for flood control, or any act undertaken pursuant to such authorization.

A party cannot sue the United States unless the United States consents to be sued. United States v. Mitchell, 445 U.S. 535, 538, 100 S.Ct. 1349 (1980). Thus, for a party to sue the United States, a clear statutory waiver of sovereign immunity must exist. Id. at 538. If sovereign immunity applies, there is no subject matter jurisdiction. United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948 (1976). Therefore, the question presented is whether the United States is immune from liability under the Flood Control Act of 1928, 33 U.S.C. § 702c.

Section 702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. The term "floodwater" "includes both 'waters that are out of control' and 'water at a flood control project.'" McCarthy, 850 F.2d at 561 (quoting United States v. James, 478 U.S. 597, 106 S.Ct. 3116 (1986)). The term "damage" includes both injury to property and injury to the person. Id. at n.1 (citing James, 106 S.Ct. at 3121). Moreover, section 702c "outlines immunity in sweeping terms;" indeed, "[i]t is difficult to imagine broader language." James, 106 S.Ct. at 3121.

Lake Havasu, which straddles the border between California and Arizona, comprises the reservoir pool for the

Parker Dam project. Id. at ¶ 3. The Parker Dam project is authorized by Congress as a flood control project. See Act of August 30, 1935, 49 Stat. 1028, 1029. In addition to being congressionally authorized as a flood control project, Parker Dam and Lake Havasu are used for the controlling of floods and flood waters. Brose Aff. at ¶ 4. The top ten feet of Lake Havasu is used to control the flood peak inflows from the tributaries between Parker Dam and Hoover Dam. Id. The elevations of the Parker flood pool have been controlled between approximate elevation 450 feet in the late spring to elevation 445.5 feet in the winter to accommodate the potential local storm inflows. Id.

As set forth above, the waters of Lake Havasu are "contained in" a federal flood control project. See McCarthy, 850 F.2d at 561. In addition, the water level is monitored and discharged when necessary. Thus, the waters of Lake Havasu satisfy the McCarthy and James definition of "floodwater," and accordingly, fall within the meaning of the statute. The Court, therefore, must determine if there is a sufficient nexus between the injury sustained by Merritt and the operation of the Congressionally authorized federal flood control project. See McCarthy, 850 F.2d at 561.

"[I]f injury resulted from the operation of [a] federal project for flood control purposes, government immunity is complete." Id. (internal quotations and citation omitted). Even if injury does not result from a perceptively active operation of the flood control facility, ongoing monitoring and discharge of water levels may constitute a sufficient nexus. See id. Thus, "[b]y including [a lake] as part of a larger federal flood control facility, the United States create[s] a condition which under a variety of circumstances could result in harm to person and property." Id. Referring to the Supreme Court in James, the Ninth Circuit stated that

the "'sweeping language' and legislative history of § 702c demonstrate a congressional intent 'to insure beyond doubt that sovereign immunity would protect the government from 'any' liability associated with flood control.'" Id. (quoting James, 106 S.Ct. at 3123).

Merritt's injuries occurred while using "flood waters" in Lake Havasu for recreational purposes. The presence of flood water in a federal flood control project created the condition upon which Merritt engaged in recreational boating. The waters upon which the casualty occurred, and in which the sign was set, are authorized, monitored, and used for flood control purposes. Accordingly, Merritt's injuries are not "wholly unrelated" to a congressionally authorized flood control project. See McCarthy, 850 F.2d at 562.

Plaintiffs attempt to avoid this conclusion by arguing that the sign was unrelated to the management of a flood control project and was erected and maintained by the Fish and Wildlife Service. However, the Court's conclusion is not altered by the fact that the Lake Havasu waters have multiple purposes. See id. at 562 (section 702c can apply even though a federal project has multiple purposes and is not intended exclusively for flood control). Justice Stevens recognized the law in the Ninth Circuit in his dissent from the Court's denial of certiorari in Hiersche v. United States, 503 U.S. 923, 112 S.Ct. 1304 (1992). Justice Stevens stated as follows:

> If this case were in one of those circuits, [10th, 4th] the claim would likely succeed because Hiersche's assignment related to fish conservation and power generation, rather than flood control. But in the Ninth Circuit, if flood control was one of the purposes of the act of Congress authorizing the project itself, the immunity applies.

Id., 112 S.Ct. at 1305 (Stevens, J., dissenting). Thus, as long as a project is authorized by Congress for flood control purposes, and the damage or injury is related to the use of that project, immunity attaches. McCarthy, 850 F.2d at 562.

As set forth above, the waters in Lake Havasu, a federal flood control project for purposes related to flood control, are a substantial factor in bringing about Merritt's injuries. As such, the immunity provision applies. See id. at 561-62. The Court, therefore, concludes that section 702c of the Flood Control Act of 1928, as construed by the Supreme court in James and the Ninth Circuit in McCarthy, bars Plaintiffs' action for the personal injuries he sustained while using the waters of Lake Havasu, a federal flood control reservoir, for recreational purposes. Accordingly, this Court lacks subject matter jurisdiction over this matter.

IV. CONCLUSION

For the foregoing reasons, the Court dismisses the complaint for lack of subject matter jurisdiction.

IT IS HEREBY ORDERED that the Defendant's motion to dismiss for Lack of Subject Matter Jurisdiction, filed November 24, 1995 (Doc. #37), is GRANTED.

IT IS FURTHER ORDERED that oral argument on Defendant's Motion to Dismiss, currently set for June 10, 1996, is VACATED as moot.

IT IS FURTHER ORDERED the clerk of the court shall terminate this action accordingly.

DATED this 28th day of May 1996.

Stephen M. McNamee
United States District Judge

Copies to all counsel of record

Steven L. MERRITT and Carol Merritt, individually and as husband and wife; Plaintiffs,

v.

UNITED STATES of AMERICA, Defendant.

No. CIV. 94-1262-PHX-SMM.

United States District Court, D. Arizona.
June 1, 1995.

Rex L. Martin, Denis R. Malm, Wachtel, Biehn & Malm, Lake Havasu city, AZ, for plaintiffs.
John Robert Mayfield, U.S. Attorney's Office, Phoenix, AZ, R. Scott Blaze, U. S. Department of Justice, Torts Branch Civil Div., Washington, D.C., Frank W. Hunger, U.S. Dept. of Justice, Washington, D.C., for defendant.

MEMORANDUM OF DECISION AND ORDER

MCNAMEE, District Judge:

I. INTRODUCTION

On August 25, 1992, Steven Merritt suffered serious injuries in a boating accident that occurred where the Colorado River meets the headwaters of Lake Havasu. Steven Merritt and his wife Carol Merritt ("Plaintiffs") brought suit against the United States ("the Government") under the Federal Tort Claims Act ("FTCA"). Plaintiffs allege that Steven Merritt's injuries occurred when his boat collided with a sign owned by the Government that was negligently erected, installed, and maintained in the waters of Lake

Havasu.

The Government moved to dismiss for lack of subject matter jurisdiction, arguing that Plaintiffs' complaint alleges an admiralty claim that can be reviewed only pursuant to the Suits in Admiralty Act ("SIAA"), 46 U.S.C. §§ 741, et seq. The Government argued that because the SIAA provides the exclusive remedy, the Court cannot entertain Plaintiff's FTCA claim. Plaintiffs responded in opposition to the Government's motion to dismiss and moved for leave to amend their Complaint to state a claim under the SIAA. The Government failed to timely respond to Plaintiff's motion to amend.

The Government's motion to dismiss and Plaintiffs' motion to amend are now ready for the Court's consideration. The Court finds that the issues presented are appropriate for resolution without oral argument.

II. DISCUSSION

A. Motion to Dismiss for Lack of Jurisdiction

Admiralty jurisdiction lies if a tort occurs on navigable waters, if the incident presents a potential hazard to maritime commerce, and if the activity leading to the incident bears a substantial relationship to traditional maritime activity. Jerome B. Grubart, Inc., v. Great Lakes Dredge & Dock Co., — U.S. —, 115 S. Ct. 1043, 1048-49 (1995). "A navigable waterway is one that is capable of being used in its ordinary condition as a highway for commerce, over which trade and travel on water may be conducted in the customary mode." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871). Courts have implicitly recognized the Colorado River as a navigable waterway. See, e.g., Brown v. United States, 403

F. Supp. 472, 473-74 (C.D. 1975). Plaintiffs have offered no authority to dispute that the accident took place on navigable waters.

The Supreme Court has determined that collisions on navigable waters involving passenger-carrying pleasure crafts create a potential hazard to maritime commerce and bear a substantial relationship to maritime commerce. Foremost Ins. Co. v. Richardson, 457 U.S. 668, 675 (1982); see also Jerome B. Grubart, 115 S. Ct. at 1051. Because Plaintiffs' claim centers on a collision involving a pleasure craft on navigable waters, the claim is subject to admiralty jurisdiction. See Foremost Ins. Co., 457 U.S. at 675.

Admiralty jurisdiction under the SIAA and jurisdiction under the FTCA are mutually exclusive. Williams v. United States, 711 F.2d 893, 895 (9th Cir. 1983). The SIAA provides:

> ... [W]here a remedy is provided by this chapter it shall be exclusive of any other action by reason of the same subject matter against an agent or employee of the United States or of any ... agency thereof whose act or omission gave rise to the claim ....

46 U.S.C. § 745. Likewise, the FTCA states that its provisions are not applicable to any claim for which a remedy is provided by the SIAA. 28 U.S.C. § 2680(d). Because Plaintiffs' complaint alleges an admiralty claim, jurisdiction lies exclusively under the SIAA. Accordingly, Plaintiffs' claim pursuant to the FTCA is dismissed.

B. Motion for Leave to Amend the Complaint

Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). When exercising its

discretion to permit amendment, "a court must be guided by the underlying purpose of Rule 15 -- to facilitate decision on the merits, rather than on the pleadings or technicalities." Roth v. Garcia Marquez, 942 F.2d 617, 628 (9th Cir. 1991) (quoting United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981)).

Plaintiffs seek to amend their complaint to state a cause of action under the SIAA. The Government has failed to respond to Plaintiff's motion to amend. Because the Government has failed to respond to the motion to amend, the motion is considered unopposed and the Government is deemed to have consented to the granting of the motion. Rule 1.10(i) of the Rules of Practice for the U.S. District Court for the District of Arizona ("Local Rules"). Local Rule 1.10 allows this Court to summarily dispose of a motion in such a situation. Plaintiffs' motion to amend is therefore granted.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that the Government's Motion to Dismiss Plaintiffs' FTCA claim [document # 22] is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Amended Complaint [document # 25] is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs shall file their Amended Complaint no later than June 23, 1995.

IT IS FURTHER ORDERED that the hearing on the Government's Motion to Dismiss set for July 31, 1995, is VACATED.

Supreme Court, U.S.
FILED
FEB 20 1998
CLERK

(2)

No. 97-1039

In the Supreme Court of the United States

OCTOBER TERM, 1997

STEVEN L. MERRITT AND CAROL MERRITT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioners' tort action arising from personal injury sustained as a result of allegedly negligent installation and maintenance of a sign located in a lake that is part of a multi-purpose federal flood control project.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1039

STEVEN L. MERRITT AND CAROL MERRITT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is unreported. The opinion of the district court (Pet. App. 8a-13a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1997. A petition for rehearing was denied on November 14, 1997. Pet. App. 1a. The petition for a writ of certiorari was filed on December 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Steven Merritt was injured in 1992 when his boat collided with a wooden sign located in the water of Lake Havasu in Arizona. Pet. App. 3a. The sign, erected and maintained by the United States Fish and Wildlife Service to mark the boundary of the Havasu National Wildlife Refuge, was not visible at night because it had no lights or reflective markings. *Id.* at 3a, 8a.

Lake Havasu is part of the Parker Dam project, which was authorized by Congress as a flood control project. Pet. App. 11a. The lake, and Parker Dam below it, are used for controlling floods and flood waters. *Ibid.* In particular, the top ten feet of water elevation in Lake Havasu are used to control the flood peak inflows from tributaries of the Colorado River between Parker Dam and the upstream Hoover Dam. *Ibid.*

2. Petitioners Steven Merritt and Carol Merritt filed this action against the United States pursuant to the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, in the United States District Court for the District of Arizona, alleging that Steven Merritt's injuries resulted from negligent installation and maintenance by the federal government of the sign with which his boat collided. Pursuant to Federal Rule of Civil Procedure 12(b)(1), the United States moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the United States is immune from liability pursuant to the Flood Control Act of 1928, 33 U.S.C. 702a *et seq.* Section 702c provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

The district court granted the government's motion to dismiss. Pet. App. 13a. The court noted that the water level of Lake Havasu is monitored and discharged when necessary for flood control purposes. *Id.* at 11a. Its own task, according to the court, was to determine "if there is a sufficient nexus between the injury sustained by Merritt and the operation of the Congressionally authorized federal flood control project." *Ibid.* The court observed that "ongoing monitoring and discharge of water levels may constitute a sufficient nexus" to invoke Section 702c. *Ibid.* Noting that "[t]he presence of flood water in a federal flood control project created the condition upon which Merritt engaged in recreational boating" —and that "[t]he waters upon which the casualty occurred, and in which the sign was set, are authorized, monitored, and used for flood control purposes"—the district court concluded that Steven Merritt's injuries were not " 'wholly unrelated' to a congressionally authorized flood control project." *Id.* at 12a (quoting *McCarthy* v. *United States*, 850 F.2d 558, 562 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989)).[1]

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[1] In *McCarthy*, the court upheld the government's claim of immunity in a suit by a swimmer severely injured when he dove into shallow water of a federal flood control lake. The court noted that "[a]lthough McCarthy's injury did not result from a perceptibly active operation of the flood control facility, the record does indicate ongoing monitoring and discharge of water levels at the Lake." 850 F.2d at 561. The court concluded that "because waters contained in a federal flood control project for purposes related to flood control were a substantial factor in bringing about McCarthy's injuries," those injuries

The district court therefore held that those injuries were within the scope of Section 702c.

3. The court of appeals affirmed in an unpublished decision. Pet. App. 2a-7a. The court reiterated its longstanding test for application of Section 702c, holding that the immunity insulates the government from liability "so long as the damage or the injury [is] not wholly unrelated to a Congressionally authorized flood control project." *Id.* at 4a (quoting *McCarthy*, 850 F.2d at 563) (internal quotation marks omitted). The court rejected petitioner's argument that the connection between the injury in question and federal flood control activities was more attenuated here than in earlier Ninth Circuit decisions applying Section 702c and that this case therefore did not satisfy the circuit's existing test for application of the immunity. Relying on this Court's emphasis in *United States* v. *James*, 478 U.S. 597 (1986), on the "sweeping language" of Section 702c (Pet. App. 5a (quoting *James*, 478 U.S. at 608)) and on its own earlier "broad holding" in *McCarthy*, the court of appeals concluded that "only a minimal causal nexus [between an injury and a federal flood control project] is required for immunity to attach." Pet. App. 5a. The court noted that Lake Havasu "continues to be used for flood control purposes" and that that use provided a "sufficient nexus" between a federal flood control project and petitioner's injury to support application of Section 702c. *Id.* at 4a-5a. The court of appeals further observed that evidence in the record "suggests that the

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were not " 'wholly unrelated' to any Act of Congress authorizing expenditures of funds for flood control"—the circuit's longstanding test for application of Section 702c. *Id.* at 561-562.

water levels at Lake Havasu may have played a role" in Steven Merritt's injuries. *Id.* at 5a-6a.

ARGUMENT

When Congress embarked upon a multi-decade program to construct dams and other structures for flood control in 1928, one of the issues it faced was the scope of the federal government's immunity from liability for damages resulting from its flood control activities. Congress limited the government's financial exposure by including in the 1928 legislation a provision that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c.

This Court broadly construed the scope of that immunity in *United States* v. *James*, 478 U.S. 597 (1986), holding that it extends both to property damage and to personal injury. *Id.* at 605. The Court interpreted the terms " 'flood' and 'flood waters' " to apply to "all waters contained in or carried through a federal flood control project for purposes of or related to flood control." *Ibid.* The "sweeping language" of Section 702c and the "equally broad and emphatic language" of its legislative history supported recognition of a broad immunity for the United States. *Id.* at 608. Accordingly, the Court concluded, "the legislative history fully supports attributing to the unambiguous words of the statute their ordinary meaning." *Ibid.*

1. Contrary to petitioners' submission (Pet. 5-6), the post-*James* decisions of the courts of appeals do not create a "sharp split" between those adopting the Ninth Circuit's "wholly unrelated to flood control" test and others requiring "some sort of nexus"

between government flood control activities and the plaintiff's injuries.[2] Both approaches require a con-

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[2] At least eleven cases involving personal injuries on or in federal flood control lakes have held that the government is immune from suit. See *Reese* v. *South Florida Water Mgmt. Dist.*, 59 F.3d 1128 (11th Cir. 1995) (holding government immune from claim involving recreational boating accident at federal flood control lake); *Boudreau* v. *United States*, 53 F.3d 81 (5th Cir. 1995) (injury to recreational boater during Coast Guard rescue), cert. denied, 116 S.Ct. 771 (1996); *Fisher* v. *United States Army Corps of Engineers*, 31 F.3d 683 (8th Cir. 1994) (recreational diving accident); *Thomas* v. *United States*, 959 F.2d 232 (4th Cir. 1992) (Table) (recreational diving accident); *Hiersche* v. *United States*, 933 F.2d 1014 (9th Cir. 1991) (Table) (accident involving professional diver inspecting dam's underwater fish screens), cert. denied, 503 U.S. 923 (1992); *Zavadil* v. *United States*, 908 F.2d 334 (8th Cir. 1990) (recreational diving accident), cert. denied, 498 U.S. 1108 (1991); *Fryman* v. *United States*, 901 F.2d 79 (7th Cir.) (recreational diving accident), cert. denied, 498 U.S. 920 (1990); *Dawson* v. *United States*, 894 F.2d 70 (3d Cir. 1990) (recreational swimming accident); *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d 246 (8th Cir. 1989) (diving accident), cert. denied, 494 U.S. 1016 (1990); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) (swimming accident); *McCarthy* v. *United States*, 850 F.2d 558 (9th Cir. 1988) (diving accident), cert. denied, 489 U.S. 1052 (1989); see also *Holt* v. *United States*, 46 F.3d 1000 (10th Cir. 1995) (government immune from suit where mist from water released from dam created ice slick on adjacent road). Property damage caused by an irrigation component of a federal flood control project likewise has been determined to be within the scope of Section 702c. See *Washington* v. *East Columbia Basin Irrig. Dist.*, 105 F.3d 517 (9th Cir.), cert. denied, 118 S. Ct. 364 (1997).

Four cases have rejected the United States' immunity defense. Those cases have involved activities unrelated to the project's flood control functions or waters found not to be "flood waters" within the meaning of Section 702c. See *Cantrell* v. *United States*, 89 F.3d 268 (6th Cir. 1996) (no

nection between the government's management of flood waters and the injury in question. Any difference concerns only how substantial that nexus must be.

In practical application, moreover, the difference between the formulations is not always easy to discern. For example, the Third Circuit (a "wholly unrelated" jurisdiction) has suggested that an injury may be "wholly unrelated" to flood control if waters contained by the flood control project are not "a substantial factor in [causing] injuries." *Dawson* v. *United States*, 894 F.2d 70, 74 (1990) (citing *McCarthy* v. *United States*, 850 F.2d 558, 561-562 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989)). See also *Bailey* v. *United States*, 35 F.3d 1118, 1121 (7th Cir. 1994) (noting that "in practice, the Eighth Circuit's 'substantial factor' analysis operates much like the 'wholly unrelated' inquiry as applied by the Third Circuit in *Dawson*.") The two approaches thus have produced similar results. Compare, *e.g.*, *McCarthy*, 850 F.2d at 562 (holding government immune under "wholly unrelated" test from claim by swimmer injured by dive into shallow water of federal flood control project); *Dewitt Bank & Trust Co.* v. *United*

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immunity from claim by recreational boater injured in Army Corps of Engineers rescue); *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity from claim by wade fisherman); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity from claim by snorkeler struck by boat); *E. Ritter & Co.* v. *Department of the Army*, 874 F.2d 1236 (8th Cir. 1989) (no immunity for erosion caused by rain waters that had not yet reached flood control project); see also *Williams* v. *United States*, 957 F.2d 742 (10th Cir. 1992) (concluding, on basis of record evidence and language of authorizing statute, that particular project was not flood control project).

States, 878 F.2d 246, 247 (8th Cir. 1989) (same result on similar facts under "substantial factor" test); *Fryman* v. *United States*, 901 F.2d 79, 82 (7th Cir.) (same result on similar facts in opinion questioning "wholly unrelated" test and suggesting flood control activities must "increase the probability" of injury to support immunity), cert. denied, 498 U.S. 920 (1990). Where no such sufficient nexus on particular facts is demonstrated, courts have rejected the defense. See *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity in death of fisherman where drowning was caused by release of water, at direction of private power company, from dam operated for hydroelectric power generation); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity for alleged negligent failure to warn swimmers of hazard from boats, in death of snorkeler struck by privately operated power boat at flood control lake). The linguistic differences among the circuits, therefore, have not produced any fundamentally different outcomes in cases.

Only the Sixth Circuit has departed from this fact-specific inquiry into the causal connection between the particular injury involved and federal flood control activities, requiring instead a connection between federal flood control efforts and the alleged tortious conduct to support immunity under Section 702c. See *Cantrell* v. *United States*, 89 F.3d 268, 273 (6th Cir. 1996) (no immunity where alleged tort—negligent piloting of Army Corps of Engineers rescue boat on flood control lake—was unrelated to federal flood control efforts). The Sixth Circuit has yet to apply its test to additional cases, however, and it is not yet clear that, in practice, its test will produce results significantly different from those under the

nexus inquiry used in all other circuits. Indeed, the Sixth Circuit itself acknowledged that "the differences between the circuits have more to do with the facts of the particular cases that the circuit courts have heard than with a dispute about the meaning of §702c." *Id.* at 272. Petitioners offer no persuasive reason for the Court to grant review—especially since this Court has denied petitions for writs of certiorari raising the nexus issue in recent Terms, including one this Term seeking review of a Ninth Circuit decision issued after *Cantrell*.[3]

2. Petitioners contend (Pet. 9) that this case merits review because the Ninth Circuit, while stating that it was applying its longstanding "wholly unrelated" to flood control test, has departed from its previous decisions by essentially eliminating the requirement of any factual nexus between a plaintiff's injury and flood control. Even if the court of appeals' opinion were read so broadly, however, review is unwarranted because the decision is unpublished and because the record below in any event establishes a clear factual nexus between the injury in this case and federal flood control activities.

The court of appeals itself acknowledged that "the deposition of Gregory Wolf suggests that the water levels at Lake Havasu may have played a role in Mr. Merritt's injuries, as water levels did in [*McCarthy*, 850 F.2d 558]." Pet. App. 5a-6a. In particular, Mr. Wolf, an employee of the United States Fish and Wildlife Service at the Havasu National Wildlife Refuge, testified that the sign with which petitioner's

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[3] See *East Columbia Basin Irrig. Dist.* v. *United States*, 118 S. Ct. 364 (1997). Three of those cases arose in the Ninth Circuit, and four in other circuits. See note 2, *supra*.

boat collided was located on an island in the lake that was submerged at some times of the year and exposed at other times because of the fluctuation of the lake's water level. C.A. E.R. 29. Similarly, James Ronald Good, Manager of the Havasu National Wildlife Refuge, testified that the sign was on dry land at some times and at others protruded above the surface of the water as the level of the lake varied. *Id.* at 48. The district court found that those fluctuations in the lake's elevation were caused by discharges of water at Parker Dam by the government for flood control purposes. Pet. App. 11a.

The complaint alleges that Steven Merritt's injury was caused by government negligence in erecting and maintaining a sign that, because it was made of dark materials and was unmarked by warning lights or buoys, represented a hazard to the boating public. Pet. 2; C.A. E.R. 3 (Complaint). As we have shown, however, the flood control functions of Lake Havasu directly affected, indeed created, the hazardous condition of which petitioners complain: an unmarked sign *in open water* when flood waters were high. This case thus closely resembles *Fryman, supra*, which petitioners cite with apparent approval (Pet. 9). There, the Seventh Circuit noted that fluctuations in the level of a flood control lake made warnings to recreational users difficult and increased the likelihood of injury. 901 F.2d at 82. Similarly here, "'the problem' is attributable in substantial part to the nature of a flood-control project." *Ibid.*

Because the facts in this case satisfy the nexus requirement for application of Section 702c that most appellate decisions since *James* have established and that petitioners would have this Court impose, and because the Ninth Circuit's unpublished decision has

no precedential value (see Ninth Circuit Rule 36-3), further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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